

1 court conviction. He filed a petition for post-conviction relief in state court. Petitioner
 2 presented his claims to the state appellate court and therefore properly exhausted his state
 3 remedies for federal habeas corpus purposes.

4 On April 12, 2005, Petitioner filed a motion for relief from the Judgment under
 5 Fed.R.Civ.P. 60(b)(5), (6) supported by a declaration of facts. (Doc. 27-28). Respondent
 6 filed a response in opposition on July 13, 2005 (Doc. 31) and Petitioner has filed a reply.
 7 (Doc. 32). Petitioner seeks relief from this Court's Judgment denying his Petition under §
 8 2254. Petitioner contends that he was entitled to have a jury determine beyond a reasonable
 9 doubt any aggravating factors relevant to his sentence. Petitioner cites, inter alia, Apprendi
 10 v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), Blakely v.
 11 Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), and United
 12 States v. Ameline, 400 F.3d 646 (9th Cir.), *reh. en banc*, 409 F.3d 1073 (9th Cir. 2005), in
 13 support of this contention. Petitioner also contends that counsel was ineffective during
 14 sentencing, again asserting that the state trial court should not have imposed an aggravated
 15 sentence. Petitioner contends in his reply that Apprendi was decided on June 26, 2000, and
 16 that he filed his initial post-conviction petition on July 21, 2000. Petitioner asserts that courts
 17 were on notice of the Apprendi holding at the time of his state post-conviction proceedings.

18 Rule 60(b) provides in relevant part as follows:

19 On motion and upon such terms as are just, the court may
 20 relieve a party or a party's legal representative from a final
 21 judgment, order, or proceeding for the following reasons:
 22 ... (5) the judgment has been satisfied, released, or discharged, or
 23 a prior judgment upon which it is based has been reversed or
 otherwise vacated, or it is no longer equitable that the judgment
 should have prospective application; or (6) any other reason
 justifying relief from the operation of the judgment.

24 Motions under Rule 60(b)(5) or (6) "shall be made within a reasonable time."

25 The Court must determine whether Petitioner's motion is in fact a Rule 60(b) motion
 26 or is a second or successive habeas petition under 28 U.S.C. § 2244(b). Petitioner seeks to
 27 challenge the Court's previous resolution of two of his claims on the merits. Petitioner
 28 asserted in his habeas petition that the state trial court relied on false information in imposing

1 an aggravated sentence and that counsel was ineffective in failing to prepare for the
2 mitigation hearing and in presenting mitigating information. In his motion for relief from
3 judgment, Petitioner contends that he was entitled to have a jury determine beyond a
4 reasonable doubt any aggravating factors relevant to his sentence. Petitioner also raises a
5 claim of ineffective assistance of counsel in this regard. A Rule 60(b) motion such as the one
6 filed by Petitioner which raises claims for relief rather than challenges to defects in the
7 federal habeas corpus proceeding is treated as a successive habeas corpus petition subject to
8 28 U.S.C. § 2244(b). Gonzalez v. Crosby, __U.S.__, 125 S.Ct. 2641, 2647 (2005).

9 Before a “second or successive” § 2254 petition may be filed in the district court, a
10 petitioner must first obtain an order from the court of appeals authorizing the district court
11 to consider the petition. 28 U.S.C. § 2244(b)(3)(A). The court of appeals will not issue an
12 order authorizing a successive petition unless the petition meets the requirements of 28
13 U.S.C. §§ 2244(b)(2). Petitioner has not presented an authorization order from the United
14 States Court of Appeals for the Ninth Circuit.

15 In the absence of proper authorization, this Court lacks jurisdiction over the merits of
16 a “second or successive” petition. See Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir.
17 2001) (*per curiam*), cert. denied, 538 U.S. 984 (2003). Consequently, the Petition and this
18 action must be dismissed without prejudice. The Clerk of Court will be directed to provide
19 Petitioner a form approved by the Ninth Circuit for filing an Application for Leave to File
20 Second or Successive Petition or Motion Under 28 U.S.C. § 2254, should Petitioner decide
21 to attempt to obtain authorization.

22 **Accordingly,**

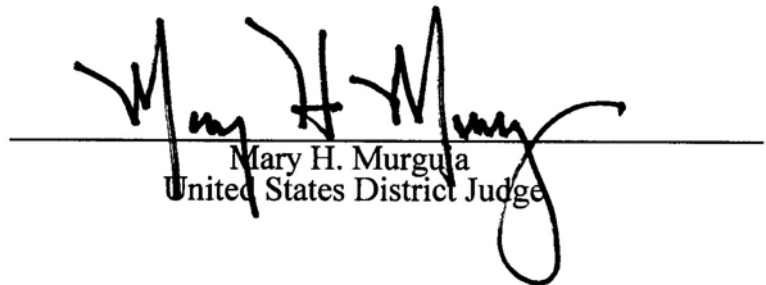
23 **IT IS ORDERED:**

24 (1) That Petitioner's Fed.R.Civ.P. 60(b) motion (Doc. 27) is denied without prejudice
25 to allow Petitioner to seek leave of the Ninth Circuit Court of Appeals to file a second or
26 successive petition; and
27
28

1 (2) That the Clerk of Court shall provide Petitioner a form approved by the Ninth
2 Circuit for filing an Application for Leave to File Second or Successive Petition or Motion
3 Under 28 U.S.C. § 2254.

4 DATED this 22th day of December, 2005.

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Mary H. Murgula
United States District Judge